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Muhammad Sheqal Gonzalo v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO S-05-(M)-384–10 OF 2016
DAVID WONG, HAMID SULTAN AND KAMARDIN HASHIM JJCA
6 FEBRUARY 2018

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Criminal Procedure — Appeal — Appeal against conviction — Accused person convicted for offence of murder — Accused set victim's house on fire — Victim died due to smoke inhalation — Whether defence probable — Admissibility of child witness — Whether evidence of child witness ought to be accepted — Whether evidence of child witness corroborated — Penal Code s 302

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The appellant was charged at the High Court for murder, an offence under s 302 of the Penal Code. The victim ('the deceased'), the appellant's girlfriend, met her fate in a fire at her house. Post mortem revealed that the deceased succumbed to her death due to smoke inhalation from the fire. According to the deceased's daughter ('PW2'): (a) she had witnessed the appellant strangling her mother on the upper floor of the house; (b) the appellant instructed her to give him a string to tier her mother; (c) the deceased was carried to another room wrapped in white cloth; (d) the appellant instructed both PW2 and her brother to get into the deceased's car which they did; and (e) it was the appellant who came back to the house and started the fire. A CCTV recording also showed the appellant purchasing a container for petrol. Satisfied that the prosecution had established a prima facie case, the appellant was called to enter his defence. In his defence, the appellant stated that he was at the house to surprise the deceased as he wanted to take her out for dinner. He also denied starting the fire, tying the deceased and wrapping her up with a cloth. The trial judge rejected the appellant's defence and convicted him for the offence. Hence, the present appeal.

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Held, dismissing the appeal:

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(1) The trial judge had warned himself about accepting the evidence of PW2 who was a child. PW2 understood the nature of an oath. In determining the weight of the evidence, the trial judge had also looked at the corroborative evidence. The totality of the evidence supported the evidence of PW2 as to who started the fire. The evidence of the witnesses corroborated all the circumstantial evidence in this case. The circumstances surrounding the event irresistibly pointed to one and only conclusion; the guilt of the appellant. The appellant's defence could not

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A stand up to reasonable scrutiny by the trial judge and hence, was rightly rejected. The conviction of the appellant was safe (see paras 23–24 & 28).

[Bahasa Malaysia summary

B Perayu dituduh di Mahkamah Tinggi kerana membunuh, satu kesalahan di bawah s 302 Kanun Keseksaan. Mangsa ('si mati'), teman wanita perayu, menemui nasibnya dalam kebakaran di rumahnya. Bedah siasat mendedahkan si mati meninggal dunia akibat menyedut asap daripada api. Menurut anak perempuan si mati ('PW2'): (a) dia telah menyaksikan perayu mencekik ibunya di lantai rumah; (b) perayu mengarahkannya supaya memberinya tali C untuk mengikat ibunya; (c) si mati, yang dibalut dengan kain putih, dibawa ke bilik lain; (d) perayu mengarahkan kedua-dua PW2 dan adiknya masuk ke dalam kereta si mati dan mereka melakukannya; dan (e) perayu yang kembali ke rumah dan membakarnya. Rakaman CCTV juga menunjukkan perayu D membeli sebuah bekas untuk petrol. Berpuas hati pihak pendakwaan berjaya membuktikan satu kes prima facie, perayu dipanggil membela diri. Dalam pembelaannya, perayu menyatakan bahawa dia berada di rumah untuk memberi kejutan kepada si mati kerana mahu membawanya keluar makan malam. Dia juga menafikan menyalakan api, mengikat si mati dan E membungkusnya dengan kain. Hakim bicara menolak pembelaan perayu dan mensabitkannya atas kesalahan tersebut. Oleh itu, rayuan ini.

Diputuskan, menolak rayuan:

F (1) Hakim bicara telah mengingatkan diri beliau tentang penerimaan keterangan PW2 yang masih kanak-kanak. PW2 memahami sifat sumpah. Dalam menentukan berat keterangan, hakim bicara juga melihat keterangan sokongan. Keseluruhan keterangan menyokong keterangan PW2 tentang siapa yang memulakan kebakaran. Keterangan G saksi-saksi menyokong semua keterangan ikut keadaan dalam kes ini. Keadaan-keadaan yang mengelilingi peristiwa tersebut, tidak dapat dielakkan, menunjukkan satu kesimpulan; kebersalahan perayu. Pembelaan perayu tidak dapat menyangkal penelitian munasabah oleh hakim bicara dan dengan itu, ditolak dengan betul. Sabitan perayu H adalah selamat (lihat perenggan 23–24 & 28).]

Notes

For cases on appeal against conviction, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 242–320.

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Cases referred to

Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Penal Code ss 300(a), (b), (c), (d), 302

Appeal from: Criminal Trial No SDK-45B-1/1 of 2014 (High Court, Sandakan)

Zaleha bt Mohd Yusuf Pan (Peter Lo & Co) for the appellant.
Norinna bt Bahadun (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

David Wong JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the High Court in which the learned judge convicted and sentenced the appellant/accused for the offence of murder under s 302 of the Penal Code.

[2] The charge against the appellant reads as follows:

> Bahawa kamu pada 12.7.2013 di antara jam 4.00 petang hingga jam 8.30 malam, bertempat di sebuah rumah di alamat A 1280, Blok 130, Lorong 38, Taman lndah Jaya, Batu 4 Sandakan, dalam daerah Sandakan, di dalam Negeri Sabah, didapati dengan niat telah membunuh Hasnah bt Astan (710111–12–5778). Oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan.

[3] We heard the appeal and after due consideration to submissions of the respective counsel and the evidence adduced in the trial court, we dismissed the appeal and affirmed the decision of the learned High Court judge. We now give our reasons for that decision.

BACKGROUND FACTS

[4] The detailed facts have been set out in the learned judge's grounds and we don't intend to repeat them here. For the purpose of this appeal we will only set out in brief the relevant facts required for our grounds.

[5] The deceased on 12 July 2013 met her fate in a fire at a house with the address at A 1280, Blok 130, Lorong 38, Taman lndah Jaya Batu 4, Sandakan, Sabah. The deceased was a single mother and lived with her two children.

[6] Following the investigation by the police pursuant to the information from the public, the appellant was arrested on 14 July 2013 at Hsiang Garden

Hotel, Sandakan. The children of the deceased were also found inside one of the rooms occupied by the appellant.

[7] Post mortem was conducted on the deceased by PW18, one Dr Jessie Hiu who had concluded that the deceased had succumbed to her death due to smoke inhalation from the fire.

[8] PW18 also had taken blood samples from the deceased and her mother, one Puan Huang Nineh for the purpose of DNA profiling. PW18 then sent those blood samples and the bones of the deceased to one Phoon Yoong Keat, PW9, a science officer attached to Jabatan Kimia Malaysia, Kuching for analysis. After analysis of the aforesaid items, PW9's report showed the deceased was the biological daughter of Puan Huang Nineh.

[9] The appellant was thereafter charged with the offence of murder.

HIGH COURT GROUNDS

[10] The learned judge from the outset properly set out the relevant elements to be proved for the charge of the murder and they are as follows:

(1) Hasnah bt Astan is the deceased;

(2) Hasnah bt Astan died due to injuries found on her; and

(3) the injuries found on Hasnah bt Astan's body were inflicted by the appellant in circumstances set out in s 300(a)–(d) of the Penal Code.

[11] In respect of elements 1 and 2, it was our considered view that the evidence was quite conclusive and the learned judge was entirely correct to conclude that the prosecution had proven them. The evidence of both PW9 and PW18 were not challenged at all and correctly accepted by the learned judge. Our view was also fortified by the fact that learned counsel for the appellant had not submitted on these aspects of the case and had only submitted on element 3 as to whether there was enough evidence to conclude beyond reasonable doubt that it was the appellant who had set the house on fire.

[12] As for element 3, the learned judge from the evidence concluded as follows. The fire to the house was deliberately lit alight by someone and not from any electrical malfunction or such similar events. This conclusion was premised on the evidence of PW7 who is from the fire department and had conducted investigation by site inspection and analysis of burnt articles from the house by the Investigation Laboratory of Jabatan Bomba dan Penyelamat Kota Kinabalu.

[13] As for the crucial issue as to the identity of the arsonist, the learned judge relied on the followings: A

(a) the appellant knew the deceased and was in fact the girlfriend of the appellant. He had also in fact visited the house quite frequently;

(b) PW13 on the fateful day of 12 July 2013 had noticed someone climbing to the upper floor of the house of the deceased and had entered it through the window. That someone according to PW13 was the appellant and the time he saw him was about 4pm. The fire happened some three to four hours after that. PW13 also took part in an identification parade conducted by PW23, one Inspector Salinie bt Ahmad, on 20 March 2013 at the operation room in Sandakan Police Station. At the identification exercise, PW13 had positively identified the appellant as the person who had entered into the house of the deceased. PW13's evidence was hardly challenged; B C D

(c) PW2, the 11 year old daughter of the deceased, had testified she had on 12 July 2013 after returning from school witnessed the appellant strangling her mother on the upper floor of the house. She was then asked by the appellant to give him a string which she obliged and was used to tie her mother. Thereafter the deceased was carried to another room wrapped in a white cloth. The appellant then instructed both PW2 and her brother to get into the deceased's car which they did. According to PW2, it was the appellant who came back to the house and started the fire to the house; E F

(d) they were then taken to Hsiang Garden hotel at around 11.30pm on the fateful day in which this evidence was confirmed by PW4, the receptionist of the aforesaid hotel; and

(e) the CCTV's evidence showed the appellant purchasing a container for the purchase of some petrol for the fire. G

[14] The learned judge premised on the above evidence called upon the appellant to enter his defence and in our view rightly so as the evidence of prosecution was such that if the appellant had remained silent the court would be duty bound to find him guilty as charged. H

[15] In his defence, the appellant gave evidence under oath and his defence was simply that it was not him who had started the fire. What had happened on that day was in direct contrast to that of the evidence of PW2. He was at the house to surprise the deceased as he wanted to take her out for dinner. But that did not happen as according to the appellant, the deceased screamed upon seeing him in the house and he tried to calm her resulting in some injuries to the deceased. He had also denied he had tied and wrapped the deceased with a I

white cloth. However, he did not deny taking PW2 and her brother into the deceased's car.

[16] The learned judge rejected the testimony of the appellant on grounds set out in paras 71–82 which for completeness we reproduce herein:

> [71] It is quite obvious that the accused had denied that he was the one who set fire at the deceased's house. He claimed that he entered the house through the main door using the keys given by the deceased. He claims he intended to surprise the deceased by coming to the house without advance notice. He claimed that the deceased was shocked and screamed upon seeing him. She fell down and he panicked. He carried the deceased to one of the bedroom; put her on a mattress before leaving the house.
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> [72] My first observation on this evidence is that it has never been put to the prosecution's witnesses during the prosecution's case. Hence this line of defence is obviously an afterthought invented by the defence after having the advantage of hearing evidence of prosecution's witnesses. This line of defence should be rejected (see *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561 and *Hamidon bin Mat Yatim v Public Prosecutor* [1995] MLJU 112; [1995] 3 CLJ 735).
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> [73] Be that as it may the accused appeared to have manufactured his evidence to suit his defence and in the process his evidence becomes illogical and unreasonable. It was his evidence that the deceased was his casual friend. He knew the deceased when he works as a security guard at Jabatan Hutan Sabah, the work place of the deceased. He seldom sees the deceased since he was transferred to Hospital Sandakan. He also said he will meet the deceased whenever she called him.
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> [74] Assuming that the accused is telling the truth, it is quite illogical for the deceased to give a set of keys to her house to a casual friend. No reasonable man would give the key to his house to a casual friend, simply because you are exposing yourself to all sort of danger that may be done by that person. It would be unreasonable for the deceased, a single mother, to trust the accused, a casual friend, to the extent of giving her house key to him.
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> [75] It may be true that she had called the accused for assistance but it would be highly improbable that she would give him the key to her house. Further this line of defence is also inconsistent with the accused's evidence that he would only go to the deceased's house whenever she called him. The purported act of giving the house key to the accused would compromise the deceased's privacy.
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> [76] Further, assuming that it is true that the accused keep a set of the deceased's house key, why should he pleaded guilty to the charge of house breaking into the deceased's house under s 357 of the Penal Code? By pleading guilty to the house breaking charge the accused is admitting to the fact that he was not authorised by the deceased to enter her house by whatever reasons.
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> [77] I also find it illogical for the accused to tie the deceased's legs, after she fell down from the first floor of the house. In his own evidence, the deceased was bleeding from her nose and ears. However, besides wiping the blood with a piece of towel, the accused did not do anything to help the deceased. The most reasonable thing to do

is to call for an ambulance or bring the deceased to the nearest clinic. Instead he decided to tie the deceased's leg with the rope that she could not find him and the children. The accused act in tying the deceased's leg is consistent with his attempt to destroy any evidence his criminal act at the deceased's house from the authority.

[78] The accused's explanation as to why he bought the container is also illogical. He claimed that the car was running low on petrol and need to be refuelled. However, instead of immediately go to a petrol station, he decided to buy a container and buy the petrol at another petrol station. In my opinion the most reasonable thing to do when your petrol is running low is to go to the nearest petrol station for refuelling. His explanation of doing so is to avoid being recorded on CCTV at the petrol station. I find his explanation unreasonable. The accused was seen at Chai Sui Teck (BOK) Sdn Bhd between 7.27–7.29pm. At that time the fire has not started and nobody knows about the criminal act of the accused. If the accused really wanted to avoid being detected through CCTV recoding, then there is no reason why he should be in full view of CCTV recording at Chai Sui Teck. Further, it would be most unreasonable and irresponsible of him leaving the children at the secluded place (ie at the back of Chai Sui Teck near the rubbish bin) when he purportedly walked to the Petronas Petrol Station at Mile 2112 to buy petrol.

[79] Further the accused's story that he had checked in to Hsiang Garden Hotel at 9pm is not consistent with the record kept by PW4 which state that check in time on 12 July 2013 was at 11.30pm.

[80] It is trite law that the burden of proof in a criminal case rest on the prosecution throughout the trial. The accused do not have any duty to prove his innocence. As long as he could raise any reasonable doubt, he is entitled for an acquittal.

[81] In this respect, his evidence must be considered in the light of the proven case for the PP. In dealing with the terms 'reasonable doubt' the case of *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16 the court states that:

> It is not mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some or possible imaginary doubt. It is the state of the case which after the entire comparison and consideration of all evidence leaves in the mind of the juror in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

[82] Applying the above statement to our present case, I am of the opinion that the accused has failed to cast any reasonable doubt on the prosecution's case. The defence consists of denials and afterthought. I am of the considered opinion that the prosecution has successfully proves its case beyond reasonable doubt. As such I find the accused guilty and convict the accused of the offence charged.

OUR GROUNDS OF DECISION

[17] From the submissions of learned counsel for the appellant, we were of the view that the main plank of attack was the identification of the appellant as the person who had set fire to the house.

[18] Her grounds are twofold. Firstly, even though PW2 testified that it was the appellant who had set fire to the house, she did not see the appellant doing it. Secondly, the CCTV from the grocery shop of Chau Sui Teck which showed the appellant buying a container was in fact inconclusive.

[19] In respect of the complaint against PW2's evidence, we, with respect, saw no merit in the learned counsel's submissions as we have found that the learned judge had dealt with the evidence in great details and had answered all the contentions raised by learned counsel. It is trite law that even when a witness is inconsistent in his or her evidence this does not in law make the whole of that evidence unreliable or ought to be rejected. In any event, PW2's evidence as correctly pointed out by the learned judge had been adequately corroborated by other evidence. Of immense significance was the fact that she was at the scene of the incident and taking that into account with other evidence, such as the presence of the appellant, PW2 and her brother at Hotel Hsiang Garden, we saw no appealable error in the learned judge concluding that PW2's evidence is believable and can be used to sustain a conviction.

[20] As for the appellant's defense, it was undisputed that it was not put to the witnesses of the prosecution and as rightly pointed out by the learned judge, the failure to put one's defence must not be underestimated though not fatal. Instructive on this point is the case of *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 where Raja Azlan Shah CJ (Malaya) (as His Highness then was) declared:

> A correct statement of the law is that failure of the defence to cross-examine the prosecution witnesses on the matter merely goes to the credibility of their testimony ... On this point we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. But as it is common with all general rules, there are also exceptions as pointed out in the judgment of the Supreme Court of New Zealand in *Transport Ministry v Garry* where Haslam J said at p 122:
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> > In *Phipson on Evidence* (11th Ed) para 1544 the learned authors suggest examples by way of exception to the general principle that failure to cross-examine will amount to an acceptance of the witness testimony, viz, where ... the story is itself of an incredible or romancing character, or the abstention arises from mere motive of delicacy ... or when counsel indicates that he is merely abstaining for convenience, eg, to save time. And where several witnesses are called on the same point, it is not always necessary to cross-examine them all.

[21] We saw no sign of the prosecution's case as being 'incredible or of a romancing nature' and thus there were no reason for us to apply the exception to the general rule.

[22] Learned counsel also submitted that the CCTV at the grocery store had

in fact showed that the appellant could not be the person who started the fire as the time shown on the CCTV was 7.27–7.29pm and hence the appellant could not have started the fire within the time frame stated in the charge which was from 4–8.30pm. This contention in fact had been dealt with by the learned judge and this was how he put it:

> [50] I must take note that the relevant recording shows that the accused bought the container at Sui Teck Company on 12th day of July 2013 between 7.27–7.29pm. On the other hand, PW2 only told the court that the accused went back into the house after driving the car to the front part of the house and set the house on fire without telling the exact time when this happened. Besides that, did the accused immediately set the fire when he first took PW2 and her brother out from the said house or did he drive to Sui Teck Company to buy the container and then the petrol before returning to the said house?
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> [51] In this respect, it must be stressed here that the accuracy of PW2's evidence was never tested in cross-examination. In so far as she is concerned, the Accused was the one who re-entered the house and set the house on fire. She was not asked whether this act was done immediately after the Accused took the car to the front of the house or whether he drove the car, bought the container at Sui Teck Company, fill the container with petrol before returning to the house and set the fire. On the other hand, the CCTV recording shows that the Accused bought the container between 7.27–7.29pm. PW13's evidence states that the fire at the deceased's house took place 3–4 hours after he saw the accused entered the house. He saw the accused entered the house at 4pm. So it is safe to state that the fire started between 7–8pm on that day. In all probability the accused must have drove the car out from the deceased's house with PW2 and her brother (sic), bought the container at Sui Teck Company at BOC, Sandakan and returned to the deceased's house with petrol in the container and set the house on fire.
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> [52] Having considered the evidence as a whole I have no hesitation in accepting PW2's evidence with regard to the event that took place in the deceased's house prior to the time when the fire started. I am also satisfied that the accused had gone to Sui Teck Company Sdn Bhd and bought a container. Then he went back to the house with the container filled with petrol and set the house on fire. In this respect, I find PW2's evidence was a/so further corroborated by PW4 who saw her with the accused when they checked in to Hsiang Garden Hotel on 12 July 2013 at about 11.30pm and PW17 who found her in room 101 of the same hotel on 14 July 2013 (sic).

[23] It should also be noted that the learned judge had also warned himself about accepting evidence of child witness as PW2 is a child. The learned judge had satisfied himself that PW2 understood the nature of an oath and in determining the weight of the evidence had also looked at the corroborative evidence.

[24] Having look at the appeal record, we found that the totality of evidence had supported the evidence of PW2 as to who had started the fire. The

circumstances surrounding the tragic event in our view had irresistibly point to one and only conclusion, the guilt of the appellant (see *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232).

CONCLUSION

[25] The crux of this appeal was simply one of identification and also basically one that has revolved on the findings of fact by the trial judge. In our view those findings were premised on evidence that had been established and corroborated. The evidence of PW2, PW13, PW3 and PW4 corroborated all the circumstantial evidence in this case. The evidence of the child PW2 remain unchallenged and the learned judge had been careful in accepting her evidence. There was no direct eyewitness to the act of the appellant inside the house but suffice to say that the circumstantial evidence was enough to convict the appellant.

[26] As such those findings cannot be said to be perverse or unreasonable and therefore they do not warrant any intervention by us.

[27] The defence of the appellant could not stand up to reasonable scrutiny by the learned judge, hence was rightly rejected.

[28] For reasons stated above, we found that the conviction of the appellant safe. Accordingly, we dismissed the appeal.

Appeal dismissed.

Reported by Afiq Mohamad Noor